

1 HONORABLE MARSHA J. PECHMAN
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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 SCOTT KINGSTON,

12 Plaintiff,

13 v.

14 INTERNATIONAL BUSINESS MACHINES
15 CORPORATION, a New York Corporation,

Defendant.

No. 2:19-cv-01488-MJP

**INTERNATIONAL BUSINESS
MACHINES CORPORATION'S MOTION
FOR SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
January 8, 2021**

16 Plaintiff Scott Kingston sued IBM bringing claims for (1) retaliation in violation of RCW
17 49.60.210; (2) breach of express unilateral contract; (3) breach of implied-in-fact contract; (4)
18 violation of RCW 49.48.010 – unpaid wages on termination; (5) failure to pay wages pursuant to
19 RCW 49.52.050; (6) unjust enrichment; (7) wrongful termination in violation of public policy;
20 and (8) age discrimination in violation of RCW 49.60.180. (Dkt. #20). After IBM moved to
21 partially dismiss Plaintiff's Amended Complaint, this Court dismissed Plaintiff's claims for
22 breach of express unilateral contract, breach of implied-in-fact contract, violation of RCW
23 49.48.010, and failure to pay wages pursuant to RCW 49.52.050. (Dkt. #27). IBM now moves
24 this Court, pursuant to Federal Rule of Civil Procedure 56, to grant summary judgment in its
25 favor and dismiss Plaintiff's remaining claims (retaliation, unjust enrichment, wrongful
26 termination, and age discrimination).

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

2 Plaintiff alleges that IBM terminated him in retaliation for his complaints about race
3 discrimination, for his complaints about IBM withholding an employee's wages, and because of
4 his age. In reality, Plaintiff's employment was terminated because he added an account to a sales
5 representative's territory after a deal with IBM customer SAS closed without a corresponding
6 increase in quota. Based on IBM's commission policies, this sales representative, Nick Donato,
7 would not have otherwise been paid for the deal because it was not in his territory. Instead this
8 late addition to Mr. Donato's territory with no corresponding quota addition generated a
9 commission payment to Mr. Donato of \$1.6 million for a deal he worked on for 10 days.
10 Furthermore, during the standard review of the commissions paid to Mr. Donato, Plaintiff had
11 the opportunity to correct this error by exercising the discretion afforded to IBM in Mr. Donato's
12 commission plan to adjust commissions. Rather than appropriately exercising this discretion,
13 Plaintiff approved the \$1.6 million payment to Mr. Donato.

14 IBM conducted an internal investigation into the commission payments on the SAS deal,
15 which led to the termination of three IBM managers: Plaintiff, Andre Temidis, and Mike Lee.
16 Importantly, this investigation was requested and started before Plaintiff ever engaged in any
17 alleged protected conduct, and the ultimate decision makers were not aware of Plaintiff's alleged
18 protected conduct. This obviates Plaintiff's retaliation and wrongful termination claims entirely.

19 Plaintiff also alleges that IBM terminated him on the basis of his age, 58. However,
20 Plaintiff has no evidence to support this claim, other than his conclusory speculation that his age
21 played a part in his termination. Moreover, no one involved in the decision to terminate
22 Plaintiff's employment was aware of Plaintiff's age. Thus, Plaintiff's age discrimination claim
23 also fails.

24 Plaintiff also alleges that IBM was unjustly enriched because it did not pay Plaintiff
25 commission he claims he was entitled to for deals that closed while he was employed, but that
26 had revenue adjustments after his employment was terminated. Plaintiff admits that he was paid
27 all money owed upon termination. Additionally, per the plain terms of Plaintiff's Incentive Plan

1 Letter (“IPL”) he would not be paid for revenue recognized after his termination. Thus,
 2 Plaintiff’s unjust enrichment claim also fails.

3 Accordingly, IBM asks this Court to dismiss all of Plaintiff’s claims.

4 **II. STATEMENT OF MATERIAL FACTS**

5 **A. Plaintiff’s Employment with IBM and Commission Plan.**

6 Plaintiff was hired by IBM in or about October 2000, when he was 41 years old. (Pl. Dep.
 7 19:13-15, 152:6-9).¹ While at IBM, Plaintiff managed a sales team, known as the ESA team. (Pl.
 8 Dep. 45:16-17). ESA stands for embedded solution agreement. (Pl. Dep. 46:5-6). ESA
 9 arrangements exist when a company develops a product and embeds IBM software within the
 10 product. (Pl. Dep. 46:7-11). One of the managers reporting to Plaintiff was Andre Temidis.
 11 (Copeland Dep. 22:21-23:13).² One of the sales representatives reporting to Mr. Temidis was
 12 Nick Donato. (Pl. Dep. 92:18-22).

13 Plaintiff and his team were paid a base salary plus commissions. (Pl. Dep. 22:2-4). At
 14 IBM, Incentive Plan Letters (or IPLs) spell out the terms of an individual’s commission plan. (Pl.
 15 Dep. 22:18-21). Generally, IBM’s commission plans run for half years, meaning from January 1
 16 to June 30 and from July 1 to December 31; sales representatives were required to sign and
 17 acknowledge their IPL for each sales period. (Pl. Dep. 22:8-17). Plaintiff and his team were on a
 18 commission plan known as an Individual Quota Plan or IQP. (Pl. Dep. 26:13-19). As managers,
 19 Plaintiff and Mr. Temidis were responsible for assigning Mr. Donato a territory and sales quota
 20 at the beginning of each sales period. (Pl. Dep. 30:8-33:9). An IQP must have a sales quota. (Pl.
 21 Dep. 29:4-7). Additionally, Plaintiff was responsible for reviewing and validating achievement
 22 and payment results before, during and after the commission close periods to ensure it is
 23 consistent with the sales representative’s established goals. (Pl. Dep. 51:21-52:11). Further, as a
 24 manager, Plaintiff was responsible for reviewing each employee’s commission statement for
 25 reasonableness after a payment cycle and if there was an issue to submit an inquiry in the inquiry

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 27 ¹ The cited portions of Scott Kingston’s Deposition (“Pl. Dep.”) are attached as Exhibit A to the Declaration of
 Justin Barnes filed herewith.

28 ² The cited portions of Dorothy Copeland’s Deposition (“Copeland Dep.”) are attached as Exhibit B to the
 Declaration of Justin Barnes filed herewith.

1 database, which Plaintiff never did. (Pl. Dep. 52:25-53:25). Plaintiff was informed that
 2 conditions that may lead to an adjustment of commissions include the need to correct errors or
 3 the need to balance with employee's contribution to the success of a large sales transaction. (Pl.
 4 Dep. 51:9-15, 54:15-22).

5 If a sales representative had an account in their territory, they would also be given a quota
 6 for that account. (Pl. Dep. 33:17-20). Commissions on IQPs are uncapped, subject to the terms in
 7 the IPL. (Johnson Dep. 40:11-15).³ In the first half of 2017, a customer called SAS was not in
 8 Mr. Donato's or Mr. Temidis's territory. (Pl. Dep. 95:22-96:21). In the IPLs there is a provision
 9 that allows for an adjustment to commissions for deals that were not anticipated during account
 10 planning or is disproportionate compared to the seller's contribution to the deal. (Pl. Dep. Ex.
 11 12). Specifically, the provision states:

12 **Review of a Specific Transaction:** If a specific customer
 13 transaction has a disproportionate effect on an incentive payment
 14 when compared with the opportunity anticipated during account
 15 planning and used for the setting of sales objectives, or is
 16 disproportionate compared with your performance contribution
 17 towards the transaction, IBM reserves the right to review, and in its
 18 sole discretion, adjust the incentive achievement or related
 19 payments.

20 (Pl. Dep. Ex. 12, at p. 2).

21 Both Plaintiff and Mr. Temidis were aware of this provision. (Larkin Dep. Ex. 25⁴, at p.
 22 3).⁵ Additionally, Plaintiff agrees that if contribution is an appropriate factor, it is permissible to
 23 adjust commissions based on contribution. (Pl. Dep. 61:16-25). Plaintiff likewise agrees that
 24 individuals should be paid commissions according to the rules in their IPL. (Pl. Dep. 107:13-19).
 25 Plaintiff's IPL also contained the following provision which explained how commission
 26 payments were paid when someone leaves IBM in the middle of a plan period:

27 **Leaving the Plan Early:** If for any reason (including leaving
 28 IBM's employment) you leave your currently assigned Incentive

26 ³ The cited portions of Karla Johnson's Deposition ("Johnson Dep.") are attached as Exhibit C to the Declaration of
 27 Justin Barnes filed herewith.

28 ⁴ Exhibit 25 to be submitted separately together with a Motion to Seal.

⁵ The cited portions of Jeff Larkin's Deposition ("Larkin Dep.") are attached as Exhibit D to the Declaration of
 Justin Barnes filed herewith.

1 Plan before the last day of its full-plan period, your final
 2 achievement for that Plan will be based on business results credited
 3 to you as of the last day of the last full-month you were on that
 4 Plan. The final incentive payments will be made according to the
 5 normal payment schedule for that Plan. If you remain with IBM in
 6 a non-incentives role, after receiving your final incentives payment
 7 your future IBM compensation will be determined by the terms of
 8 your new role.

9 (Pl. Dep. Ex. 12, at p. 3).

10 **B. The SAS Deal.**

11 On or about June 20, 2017, the vice president from a different sales team reached out to
 12 Plaintiff to see if the ESA team could help on a deal with IBM customer SAS. (Pl. Dep. 87:1-4,
 13 88:16-89:2). Plaintiff assigned the deal to Mr. Temidis and Mr. Donato. (Pl. Dep. 92:14-17). Mr.
 14 Donato worked on the deal for 10 days and helped to close the deal on June 30, 2017. (Pl. Dep.
 15 93:5-11). After the deal closed, Mark Baglini (CFO for North America Storage Sales) reached
 16 out to the incentives and commissions department about the commissions on the SAS deal.
 17 (Johnson Dep. 162:7-163:1). Karla Johnson, Director of Sales Commissions for North America
 18 and Latin America, determined that Mr. Temidis and Mr. Donato did not have the SAS account
 19 in their territory and thus should not receive commissions for the SAS deal. (Johnson Dep.
 20 163:19-164:16). Ms. Johnson informed Mr. Baglini that because individuals are paid for
 21 accounts in their territory, Mr. Donato and Mr. Temidis would not be paid on the deal, but they
 22 could use an IBM program called “share of credit” to share some of the commission payments
 23 with them. (Johnson Dep. 164:19-165:13, 166:15-167:8). A share of credit was not pursued.
 24 (Larkin Dep. 288:22-289:8). Instead, Plaintiff and Mr. Temidis added SAS to Mr. Temidis’s and
 25 Mr. Donato’s territory after the deal closed but did not add any quota for this account. (Pl. Dep.
 26 95:22-96:21, 97:13-98:13; Johnson Dep. 92:21-93:11). This resulted in a commission payment to
 27 Mr. Donato of approximately \$1.6 million. (Pl. Dep. 109:14-22, 115:15-117:12).

28 At IBM there is a process to approve large commission payments. (Pl. Dep. 111:13-16).
 29 As part of the review process, first- and second-line managers were required to review and
 30 validate the revenue and quota and ensure that the payment was being calculated correctly. (Pl.

1 Dep. 113:1-11). If the revenue or quota were incorrect, the managers were required to contact the
 2 commissions analyst and inform them of the error. (Pl. Dep. 113:12-15). Although SAS was
 3 added to Mr. Donato's territory after the deal closed without an increase in quota, and although
 4 both Mr. Temidis and Plaintiff were aware of the Specific Transaction provision in Mr. Donato's
 5 IPL, both Mr. Temidis and Plaintiff approved Mr. Donato's commissions on the SAS deal and
 6 did not raise any concerns with the commissions analyst, thus approving the \$1.6 million
 7 commission payment to Mr. Donato. (Pl. Dep. 115:15-116:21).

8 **C. The Investigation into Commissions Paid on the SAS Deal.**

9 ***1) Ms. Johnson Submits Allegations Related to the Payments on the SAS Deal.***

10 On October 7, 2017, finance reached out to Ms. Johnson about the commissions paid on
 11 the SAS deal. (Johnson Dep. 133:7-16, 137:9-138:8). This caused Ms. Johnson to examine the
 12 payments on the deal. (Johnson Dep. 133:7-134:10). She discovered that SAS was added to Mr.
 13 Temidis and Mr. Donato's territories after the deal closed without a corresponding addition to
 14 quota, which resulted in the large payment to Mr. Donato. (Johnson Dep. 133:7-134:10). Ms.
 15 Johnson also discovered that the account was added to another sales representative's (William
 16 Sherrin) territory after the deal closed without a corresponding increase in quota. (Johnson Dep.
 17 133:7-134:10). Ms. Johnson viewed this as a business process violation, so she reached out to
 18 Internal Audit on October 16, 2017 about the territory additions without quota. (Johnson Dep.
 19 29:7-30:1, 141:6-142:2). When an allegation is submitted, an Allegation Review Board reviews
 20 the allegations and determines what action to take, which could include initiating an
 21 investigation. (Larkin Dep. 94:14-95:23). After reviewing the allegations, Internal Audit initiated
 22 an investigation and Jeff Larkin was assigned as the investigator. (Larkin Dep. 46:12-47:11).

23 ***2) Mr. Larkin Conducts the Investigation and Ms. Kenny Recommends Termination.***

24 Over the course of 60 days and approximately 100 hours, Mr. Larkin collected and
 25 reviewed facts, conducted interviews, and prepared an investigation report related to the
 26 commissions paid on the SAS deal. (Larkin Dep. 86:19-90:6). Mr. Larkin's role is to present the
 27 facts related to the situation, not to make disciplinary recommendations. (Larkin Dep. 161:23-
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1 162:4, 184:13-19). Mr. Larkin investigated whether management authorized inappropriate
 2 commission payments for a transaction that was not reflected in the sellers' quota. (Larkin Dep.,
 3 Ex. 25 at p. 2). The investigation report noted that the SAS deal closed on June 30, 2017 and was
 4 added to Mr. Donato, Mr. Temidis, and Mr. Sherrin's territory on July 19, 2017. (Larkin Dep.,
 5 Ex. 25 at p. 2). As a result of the investigation, Mr. Larkin found that Plaintiff and Mr. Temidis
 6 were negligent in not initiating an adjustment of Mr. Donato's commissions on the SAS deal for
 7 which he had no quota. (Larkin Dep., Ex. 25 at p. 3). Additionally, Mr. Larkin found that
 8 although both Plaintiff and Mr. Temidis acknowledged that the payment was in excess of what
 9 Mr. Donato earned or deserved and that they were aware of the Specific Transaction provision,
 10 they did nothing to adjust Mr. Donato's commissions or raise the issue with their manager.
 11 (Larkin Dep. 134:1-135:7, 152:20-154:9, Ex. 25 at p. 3). Additionally, Mr. Larkin found that
 12 Mike Lee (Mr. Sherrin's manager) failed to ensure that Mr. Sherrin's commissions were adjusted
 13 for the SAS deal. (Larkin Dep., Ex. 25 at pp. 2, 3). After Mr. Larkin completes an investigation
 14 report, he sends it to Human Resources for assignment to a case manager to determine the
 15 appropriate disciplinary actions if the allegations are substantiated. (Larkin Dep. 184:13-19).
 16 Here, the allegations were substantiated. (Larkin Dep. Ex. 25 at p. 2).

17 Linda Kenny, who is a member of the Employee Concerns and Appeals team, was
 18 assigned as the case manager for the SAS investigation. (Kenny Dep. 23:5-24:6, 42:1-12).⁶ Ms.
 19 Kenny's role was to review Mr. Larkin's report and determine the recommended disciplinary
 20 actions for Plaintiff, Mr. Temidis, and Mr. Lee and to facilitate obtaining the required approvals
 21 for the disciplinary actions. (Kenny Dep. 23:18-24:16, 246:10-22). Based on the facts in the
 22 investigation report, Ms. Kenny determined that the appropriate recommendation for Plaintiff,
 23 Mr. Temidis, and Mr. Lee was termination of employment. (Kenny Dep. 26:3-6). Ms. Kenny
 24 recommended termination for Plaintiff and Mr. Temidis because they did not add quota for the
 25 SAS deal to Mr. Donato's quota, they were aware of but did not use the Specific Transaction
 26 provision or speak with anyone about using that provision, and she felt they exercised poor

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 28 ⁶ The cited portions of Linda Kenny's Deposition ("Kenny Dep.") are attached as Exhibit E to the Declaration of
 Justin Barnes filed herewith.

1 business judgment by not speaking with the upline manager before approving the commissions
 2 even though Plaintiff said he expected his manager to raise red flags that never materialized.
 3 (Kenny Dep. 48:18-49:7, 71:4-11, 72:8-13, 85:2-8, 91:17-23, 107:14-24, 226:2-228:3, 228:14-
 4 229:7, 235:18-24). Ms. Kenny recommended termination for Mr. Lee because he did not ensure
 5 that Mr. Sherrin's commissions were adjusted after being told by his manager to make an
 6 adjustment. (Kenny Dep. 177:5-21, 185:7-186:14).

7 **3) *Based on Ms. Kenny's Recommendation, Plaintiff, Mr. Temidis, and Mr. Lee's***
Employment is Terminated.

9 Once Ms. Kenny develops a recommendation, she speaks with the North American
 10 Consistency Reviewer who reviews the recommendation to ensure it is an appropriate
 11 recommendation and consistent with recommendations in other situations. (Kenny Dep. 247:3-
 12 248:9, Mandel Dep. 44:19-45:1).⁷ Russell Mandel was the consistency reviewer in this case.
 13 (Mandel Dep. 4p.14:19-45:1). Mr. Mandel spoke with Ms. Kenny and agreed with her
 14 recommendations. (Mandel Dep. 55:17-24). After Mr. Mandel approved the recommendations,
 15 the recommendations were sent to Dorothy Copeland, the manager responsible for implementing
 16 the recommendations and a Review Board which consisted of Lisa Mihalik (HR), Cindy
 17 Alexander (Finance), and Scott Ferrauiola (Legal). (Kenny Dep. 266:9-267:5, 267:21-268:16).
 18 The Review Board approved the recommended actions for Plaintiff, Mr. Temidis, and Mr. Lee.
 19 (Alexander Dep. 82:1-20).⁸

20 Before agreeing with the recommendations, Ms. Copeland spoke with her managers
 21 Stephen Leonard and John Teltsch, Ms. Mihalik, and Ms. Copeland's HR partner Dominic
 22 Agostino. (Copeland Dep. 61:8-19). Ms. Mihalik and Mr. Leonard told Ms. Copeland that she
 23 had to follow the recommendation of termination. (Copeland Dep. 138:15-139:3). Ms. Copeland
 24 followed the recommendation from Ms. Kenny and all three employees were terminated.
 25 (Copeland Dep. 145:15-19). Plaintiff agrees that Ms. Copeland deferred the authority to make a

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 27 ⁷ The cited portions of Russell Mandel's Deposition ("Mandel Dep.") are attached as Exhibit F to the Declaration of
 28 Justin Barnes filed herewith.

⁸ The cited portions of Cindy Alexander's Deposition ("Alexander Dep.") are attached as Exhibit G to the
 Declaration of Justin Barnes filed herewith.

1 decision to Mr. Leonard, Ms. Mihalik, and Ms. Kenny and that Ms. Copeland's involvement in
 2 the decision was irrelevant. (Pl. Dep. 135:2-136:4). Plaintiff's employment was terminated on
 3 April 16, 2018. (Pl. Dep. 19:16-19). At the time of his termination, Plaintiff had been paid all
 4 commissions he was owed. (Pl. Dep. 153:22-154:4).

5 **D. Plaintiff Alleges He was Terminated for Complaints About Race Discrimination.**

6 Plaintiff alleges that he was terminated in retaliation for complaining about IBM's
 7 discriminatory treatment of an African American sales representative named Jerome Beard in
 8 comparison to Mr. Donato, who is Caucasian, because Mr. Beard's commissions were reduced
 9 on a different deal in 2017. (Am. Compl., Dkt. #20, ¶¶ 62-69). He believes he was terminated for
 10 his complaints because the offered explanation is "patently ridiculous." (Pl. Dep. 132:19-24). He
 11 believes this even though he is aware of other white sales representatives on the ESA team who
 12 had their commissions reduced. (Pl. Dep. 62:20-63:20). The first time Plaintiff alleges that he
 13 raised concerns about Mr. Beard's commissions and race discrimination was to Rose Nunez on
 14 November 15, 2017, after the allegations related to SAS had already been raised with Internal
 15 Audit and after Mr. Larkin initiated the investigation. (Pl. Dep. 63:21-64:13, 127:13-20; Johnson
 16 Dep. 29:7-30:1, 141:6-142:2; Larkin Dep. 86:3-15). After the first conversation with Ms. Nunez,
 17 Plaintiff alleges that he also raised concerns related to Mr. Beard's race to his manager Dave
 18 Mitchell. (Pl. Dep. 69:14-70:17). Plaintiff also alleges that he spoke with Ms. Copeland and Mr.
 19 Temidis regarding Mr. Beard's commission payments and concerns about race. (Pl. Dep. 71:11-
 20 73:5). The last time Plaintiff brought up Mr. Beard's race was to Ms. Copeland around January
 21 25, 2018. (Pl. Dep. 78:23-80:6). Plaintiff does not know if Ms. Copeland, Mr. Mitchell, or Ms.
 22 Nunez told anyone about his concerns of race discrimination. (Pl. Dep. 80:7-13).

23 Ms. Copeland did not tell anyone about Plaintiff's concerns. (Copeland Dep. 54:8-10).
 24 Neither Mr. Mitchell nor Ms. Nunez told anyone about Plaintiff's concerns. (Mitchell Decl., ¶ 6;
 25 Nunez Decl., ¶ 6).⁹ The individual who raised the allegations against Plaintiff (Karla Johnson),

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⁹ The declaration of Dave Mitchell ("Mitchell Decl.") is attached as Exhibit K to the Declaration of Justin Barnes filed herewith. The declaration of Rosalva Nunez ("Nunez Decl.") is attached as Exhibit L to the Declaration of Justin Barnes filed herewith.

1 the investigator (Jeff Larkin), and the individual responsible for the recommendations of
 2 termination (Linda Kenny) did not know Mr. Beard's race at the time of the SAS investigation
 3 and were not aware of any complaints of race discrimination or any unlawful activity raised by
 4 Plaintiff. (Johnson Dep. 75:8-19, 194:12-16; Larkin Dep. 61:3-15, 297:11-25; Kenny Dep.
 5 339:19-340:4). Likewise, at the time of the SAS investigation, Cindy Alexander, John Teltsch,
 6 Lisa Mihalik, Russell Mandel, and Stephen Leonard did not know Mr. Beard's race nor were
 7 they aware of any complaints of discrimination or unlawful conduct raised by Plaintiff.
 8 (Alexander Dep. 20:7-17, 299:6-15; Teltsch Dep. 147:20-148:1, 179:24-180:3; Mihalik Dep.
 9 239:7-9, 265:14-17; Mandel Dep. 149:14-16, 167:12-18; Leonard Dep. 191:8-9, 247:7-16).¹⁰

10 **E. Plaintiff Alleges He was Terminated due to His Age.**

11 Plaintiff also alleges that he was terminated due to his age, 58. (Am. Compl., Dkt. #20, ¶¶
 12 125-129). While Plaintiff thinks his age may have contributed to his termination, he thinks the
 13 more likely final contributing factor were his complaints of race discrimination. (Pl. Dep.
 14 151:13-152:5). Plaintiff believes he was terminated for his age because there were
 15 "programmatic efforts" to "remove older employees," one of which Plaintiff contends was called
 16 Project Sunrise. (Pl. Dep. 140:6-141:2). According to Plaintiff, Project Sunrise was executed via
 17 resource actions (IBM terminology for a reduction in force). (Pl. Dep. 141:3-14). Plaintiff was
 18 not terminated as part of a resource action. (Kenny Dep. 140:1-141:1).

19 Furthermore, at the time of his termination, Ms. Alexander, Ms. Copeland, Mr. Larkin,
 20 Mr. Teltsch, Ms. Johnson, Ms. Mihalik, Ms. Kenny, Mr. Mandel, and Mr. Leonard all did not
 21 know how old Plaintiff was. (Alexander Dep. 299:20-22; Copeland Dep. 222:13-18; Larkin Dep.
 22 295:16-18; Teltsch Dep. 179:16-18; Johnson Dep. 191:3-6; Kenny Dep. 339:2-7; Mihalik Dep.
 23 265:21-23; Mandel Dep. 175:2-3; Leonard Dep. 246:23-247:1).

24 **III. ARGUMENT AND CITATION TO AUTHORITY**

25 **A. Plaintiff's Retaliation Claim Fails.**

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 27 ¹⁰ The cited portions of John Teltsch's Deposition ("Teltsch Dep.") are attached as Exhibit H to the Declaration of
 28 Justin Barnes filed herewith; the cited portions of Lisa Mihalik's Deposition ("Mihalik Dep.") are attached as
 Exhibit I to the Declaration of Justin Barnes filed herewith; the cited portions of Stephen Leonard's Deposition
 ("Leonard Dep.") are attached as Exhibit J to the Declaration of Justin Barnes filed herewith.

1 Plaintiff alleges that he was fired in retaliation for his complaints of race discrimination
 2 in violation of RCW 49.60.210. To establish a *prima facie* case of retaliation, Plaintiff must
 3 show that (1) he engaged in a statutorily protected activity; (2) he suffered an adverse
 4 employment action; and (3) there was a causal connection between the exercise of the legal right
 5 and the adverse employment action. *Dean v. Avis Budget Car Rental, LLC*, Case No. C10-277
 6 MJP, 2011 U.S. Dist. LEXIS 50144, at *15 (W.D. Wash. May 10, 2011) (citing *Wilmot v. Kaiser*
 7 *Aluminum & Chem. Corp.*, 118 Wn. 2d 46, 68-69, 821 P.2d 18 (1991)). If Plaintiff establishes a
 8 *prima facie* case, IBM has the opportunity to show a legitimate non-retaliatory reason for the
 9 adverse action. *Id.* If IBM produces such evidence, Plaintiff must then show IBM's reason is
 10 pretextual, i.e. that retaliation was a substantial factor motivating the adverse action. *Id.* (citing
 11 *Allison v. Housing Authority of City of Seattle*, 118 Wash. 2d 79, 85, 821 P.2d 34 (1991)).
 12 Plaintiff's retaliation claim fails because he cannot show that there is a causal connection
 13 between his alleged protected activity and his termination. Furthermore, even if Plaintiff
 14 establishes a *prima facie* case of retaliation, he cannot show that IBM's reason for his
 15 termination was pretext for retaliation.

16 **1) Plaintiff Cannot Show His Termination of Employment was Causally Related to Any
 17 Alleged Complaints of Race Discrimination.**

18 Naturally, Plaintiff must show that the decision makers knew of his alleged protected
 19 activity to prove causation. *Carroll v. Univ. of Wash.*, No. C08-1498Z, 2010 U.S. Dist. LEXIS
 20 152493, at *21 (W.D. Wash. Sept. 27, 2010) (“Essential to a causal link is evidence that the
 21 employer was aware that the plaintiff had engaged in the protected activity.”) (citation omitted).
 22 Plaintiff alleges he complained about race discrimination to Rose Nunez, Dave Mitchell, and
 23 Dorothy Copeland, but he does not know if any of them told anyone about his concerns. (Pl.
 24 Dep. 63:21-64:13, 69:14-70:17, 71:11-73:5, 80:7-13, 127:13-20). In fact, Ms. Copeland did not
 25 tell anyone about Plaintiff's concerns. (Copeland Dep. 54:8-10). Likewise, neither Mr. Mitchell
 26 nor Ms. Nunez told anyone about Plaintiff's concerns. (Mitchell Decl., ¶ 6; Nunez Decl., ¶ 6).
 27 Additionally, not only did none of the following individuals know Mr. Beard's race at the time of
 28

1 the investigation, they were not aware of any complaints of unlawful conduct by Plaintiff: the
 2 individual who raised the allegations against Plaintiff (Ms. Johnson); the individual who
 3 investigated the allegations (Mr. Larkin); the individuals who made the recommendation for
 4 termination (Ms. Kenny and Mr. Mandel); the Review Board (Ms. Mihalik and Ms. Alexander);
 5 and the individuals who told Ms. Copeland she needed to carry out the recommendation of
 6 termination (Mr. Leonard and Ms. Mihalik). (Johnson Dep. 75:8-19, 194:12-16; Larkin Dep.
 7 61:3-15, 297:11-25; Kenny Dep. 339:19-340:4; Alexander Dep. 20:7-17, 299:6-15; Teltsch Dep.
 8 147:20-148:1, 179:24-180:3; Mihalik Dep. 239:7-9, 265:14-17; Mandel Dep. 149:14-16, 167:12-
 9 18; Leonard Dep. 191:8-9, 247:7-16). The only person involved in the termination who was
 10 aware of any concerns raised by Plaintiff was Ms. Copeland, who testified that she was not the
 11 decision maker and merely implemented the recommendations. (Copeland Dep. 138:15-139:3,
 12 145:15-19). Indeed, Plaintiff agrees that Ms. Copeland deferred the decision to others and that
 13 “her involvement was as close to irrelevant as [Plaintiff] could imagine.” (Pl. Dep. 135:2-136:4).
 14 Additionally, the last alleged conversation Plaintiff and Ms. Copeland had regarding Plaintiff’s
 15 concerns was almost three months prior to his termination. (Pl. Dep. 19:16-19, 78:23-80:6).
 16 *Serlin v. Alexander Dawson Sch., LLC*, 656 Fed. App’x 853, 856 (9th Cir. 2016) (three months
 17 between complaint and decision was insufficient evidence of causation where no other evidence
 18 of retaliation existed). Plaintiff cannot show that the decision makers were aware of his alleged
 19 protected activity and, thus, cannot show a causal connection.

20 Further, Plaintiff testified that the first time he complained about race discrimination was
 21 November 15, 2017. (Pl. Dep. 63:21-64:13, 127:13-20). It is undisputed that Ms. Johnson raised
 22 allegations regarding Plaintiff on October 16, 2017, a month prior to any alleged complaints by
 23 Plaintiff. (Johnson Dep. 29:7-30:1, 141:6-142:2). Further, the investigator, Mr. Larkin testified
 24 that he began his investigation in late October or early November. (Larkin Dep. 86:3-15). That
 25 the allegations and investigation were initiated prior to Plaintiff’s alleged complaints further
 26 belies a finding of any causal connection between his termination and his alleged protected
 27 activity. *Ramsey v. City of Philomath*, 182 Fed. App’x 678, 680 (9th Cir. 2006) (“Where the

1 decision to take an adverse employment action is made prior to any protected activity, no
 2 factfinder could find the requisite causal link between the employment action and the protected
 3 conduct."); *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1126 (W.D. Wash. 2004) (where
 4 employer considered a reassignment of plaintiff with different responsibilities prior to the
 5 plaintiff's complaint, the plaintiff failed to establish the necessary causal link for a retaliation
 6 claim).

7 Accordingly, Plaintiff's retaliation claim fails.

8 **2) Plaintiff Cannot Show that IBM's Legitimate Non-retaliatory Reason for His
 9 Termination of Employment was a Pretext for Retaliation.**

10 Even if Plaintiff can make out a *prima facie* case of retaliation (he cannot), he cannot
 11 show that IBM's reason for his discharge was a pretext for retaliation. IBM terminated Plaintiff
 12 (and Mr. Temidis) because they did not add quota for the SAS deal to Mr. Donato's quota as
 13 required, they were aware of but did not use the Specific Transaction provision or speak with
 14 anyone about using that provision, and they exercised poor business judgment by not speaking
 15 with the upline manager before approving the commissions even though Plaintiff said he
 16 expected his manager to raise red flags that never materialized. (Kenny Dep. 48:18-49:7, 71:4-
 17 11, 72:8-13, 85:2-8, 91:17-23, 107:14-24, 226:2-228:3, 228:14-229:7, 235:18-24). Thus, IBM
 18 has met its burden to show a legitimate, non-retaliatory action for its decisions. *Lillywhite v.*
 19 *AECOM*, Case No. C18-1840-JCC, 2020 U.S. Dist. LEXIS 205487, at *15 (W.D. Wash. Nov. 3,
 20 2020) (termination for poor judgment and failure to follow policy was legitimate non-retaliatory
 21 reason); *Cockle v. Nelson*, No. 16815-8-III, 1999 Wash. App. LEXIS 166, at *19 (Ct. App.
 22 Wash. Feb. 2, 1999) (where employer argued conduct violated company policy it had met its
 23 burden of establishing a legitimate reason for the adverse action).

24 Plaintiff has no evidence that retaliation was a substantial factor motivating his
 25 termination of employment. In fact, the undisputed facts show the opposite. To believe Plaintiff's
 26 story, this Court must believe that individuals who did not know Mr. Beard's race or that
 27 Plaintiff had raised any concerns about race discrimination were somehow motivated by

1 retaliation for Plaintiff's complaints that they were not even aware of, including Karla Johnson
 2 who raised allegations prior to any complaints by Plaintiff, Jeff Larkin who initiated the
 3 investigation prior to any complaints by Plaintiff, and the decision makers. (Pl. Dep. 63:21-
 4 64:13, 127:13-20; Johnson Dep. 29:7-30:1, 141:6-142:2; Larkin Dep. 86:3-15). Accordingly,
 5 Plaintiff cannot show he was terminated in retaliation for his alleged complaints.

6 Although Plaintiff does not like the result of the investigation and thinks the reason for
 7 his termination is "patently ridiculous," this does not make a retaliation claim. *Atkins v. Runyon*,
 8 No. 97-56322, 1998 U.S. App. LEXIS 17532, at *3 (9th Cir. July 27, 1998) (citing *Collings v.*
 9 *Longview Fibre Co.*, 63 F.3d 828, 833-34 (9th Cir. 1995) (to avoid summary judgment,
 10 employee must produce specific, substantial, non-conclusory evidence of pretext)). Plaintiff has
 11 no evidence that retaliation was a substantial factor motivating his termination of employment,
 12 and his conclusory allegations are insufficient to save his claims. Therefore, the Court should
 13 grant IBM summary judgment on Plaintiff's retaliation claim. *See Dean v. Avis Budget Car*
 14 *Rental, LLC*, Case No. C10-277 MJP, 2011 U.S. Dist. LEXIS 50144, at *17-18 (W.D. Wash.
 15 May 10, 2011) (granting summary judgment to employer on retaliation claim where despite
 16 plaintiff's argument that defendant conducted an inadequate investigation into plaintiff's
 17 complaint, but rather investigated complaints against plaintiff, plaintiff could not show he was
 18 terminated in retaliation for his complaints).

19 **B. Plaintiff's Wrongful Termination Claim Fails.**

20 Plaintiff alleges that he was terminated in violation of public policy for reporting IBM's
 21 misconduct. Plaintiff bases his wrongful termination claim on the Washington Law Against
 22 Discrimination ("WLAD") and the policy against racial discrimination found in RCW 49.60.030.
 23 (Dkt. #20, at ¶¶ 107, 113). Additionally, Plaintiff bases his claim on the policy set forth in RCW
 24 49.52.050 regarding payment of wages earned. (Dkt. #20, at ¶¶ 110, 113). To establish a claim
 25 for wrongful discharge in violation of public policy, Plaintiff must show either that the discharge
 26 alleged arises under one of four established public-policy related categories or meets the
 27 requirements of the alternative *Perritt* test adopted in *Gardner v. Loomis Armored, Inc.*, 128
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1 Wn.2d 931, 936. *See, Martin v. Gonzaga University*, 191 Wn.2d 712, 723-24 (2018); *Becker v.*
 2 *Cnty. Health Sys., Inc.*, 184 Wash. 2d 252, 258-59, 359 P.3d 746, 749 (2015). Here, Plaintiff
 3 claims his discharge was in retaliation for reporting employer misconduct. Retaliation for
 4 reporting misconduct is the fourth category of public policy set forth in *Thompson* and *Wilmot*
 5 and reaffirmed in *Martin*.

6 Under *Martin*, Plaintiff must first show that his “discharge may have been motivated by
 7 reasons that contravene a clear mandate of public policy.” *Martin*, 191 Wn.2d at 725. Plaintiff
 8 first must establish a *prima facie* case by producing evidence that the public-policy-linked
 9 conduct was a cause of the firing. *Id.* at 725-26. If Plaintiff succeeds in presenting a *prima facie*
 10 case, the burden then shifts to IBM to “articulate a legitimate nonpretextual nonretaliatory reason
 11 for the discharge.” *Id.* (citation omitted). This is a burden of production, not persuasion. *Id.*
 12 (“The employer must produce relevant admissible evidence of another motivation, but need not
 13 do so by the preponderance of evidence necessary to sustain the burden of persuasion, because
 14 the employer does not have that burden.”) (citation omitted). If IBM articulates such a reason,
 15 the burden shifts back to Plaintiff either to show “that the reason is pretextual, or by showing that
 16 although the employer's stated reason is legitimate, the [public-policy-linked conduct] was
 17 nevertheless a substantial factor motivating the employer to discharge the worker.” *Id.* (citations
 18 omitted).

19 Here, Plaintiff cannot show his alleged public-policy-linked conduct caused his
 20 termination of employment (e.g. decision makers were not aware of any complaints by Plaintiff
 21 of unlawful conduct) or that IBM's reason for discharge is a pretext for retaliation. *See* Section
 22 II.A above. Additionally, as with his alleged complaints of race and age discrimination, the
 23 investigation of the SAS deal was initiated prior to Plaintiff raising any complaints about IBM's
 24 failure to pay Mr. Beard his earned commissions. (Pl. Dep. 63:21-64:13, 127:13-20; Johnson
 25 Dep. 29:7-30:1, 141:6-142:2; Larkin Dep. 86:3-15). A complaint that happened later in time
 26 cannot be the cause of a termination that began with the earlier investigation.

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1 Further, with respect to Plaintiff's alleged protected activity under the Wage Act, Plaintiff
 2 has failed to even identify any employee who he contends was protected by the Wage Act, much
 3 less any employee whose rights under the Wage Act were violated. And even if he could identify
 4 such a person, this Court previously dismissed Plaintiff's claims for violation of the Wage Act in
 5 light of the plain language in IBM's commission plans (i.e., the IPLs). (Dkt. #27, at pp. 9-10).
 6 Thus, IBM could not have violated RCW 49.52.050 in reducing any employee's commissions,
 7 and that statute could not have formed the predicate for any alleged protected activity. *Dicomes*
 8 *v. State*, 113 Wn. 2d 612, 620, 624 (1989) (affirming summary judgment to employer where
 9 there was no violation of public policy after considering whether "the employer's conduct
 10 constituted either a violation of the letter or policy of the law.").

11 Accordingly, the Court should grant IBM summary judgment on Plaintiff's wrongful
 12 termination claim.

13 **C. Plaintiff's Age Discrimination Claim Fails.**

14 Plaintiff also alleges that his employment was terminated due to his age. To succeed on
 15 his age discrimination claim, Plaintiff must show that his age was a substantial or motivating
 16 factor behind his termination. *Trzebiatowski v. Walgreen Co.*, Case No. C09-0228-RSM, 2011
 17 U.S. Dist. LEXIS 7851, at *9 (W.D. Wash. Jan. 27, 2011). Plaintiff has no direct evidence of age
 18 discrimination. (Pl. Dep. 143:25-145:9). Thus, Plaintiff's age discrimination claim is subject to a
 19 burden-shifting analysis. *Trzebiatowski*, 2011 U.S. Dist. LEXIS at *9. Plaintiff bears the burden
 20 of proving (1) that he is over 40; (2) that he was discharged; (3) that he was doing satisfactory
 21 work; and (4) he was replaced by a younger person. *Id.* If Plaintiff proves a *prima facie* case,
 22 IBM then has the opportunity to articulate a legitimate, non-discriminatory reason for Plaintiff's
 23 discharge. *Id.* at *10. Then, to create a genuine issue of material fact, Plaintiff must satisfy his
 24 ultimate burden of persuasion and show that IBM's articulated reasons are a mere pretext for a
 25 discriminatory purpose. *Id.*

26 Plaintiff bases his age discrimination claim on nothing besides speculation. Specifically,
 27 Plaintiff believes he was terminated for his age because there were "programmatic efforts" to
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1 “remove older employees,” one of which was allegedly called Project Sunrise. (Pl. Dep. 140:6-
 2 141:2). According to Plaintiff, Project Sunrise was executed via resource actions (IBM’s
 3 terminology for reductions in force). (Pl. Dep. 141:3-14). However, Plaintiff was not terminated
 4 as part of a resource action. (Kenny Dep. 140:1-141:1). Plaintiff has no evidence that his age was
 5 a substantial or motivating factor in his termination other than speculating that his age was a
 6 “contributing cause to my termination is I believe entirely possible, probable.” *Id.* This is not
 7 enough to establish a claim for age discrimination. *Grimwood v. Univ. of Puget Sound*, 110 Wn.
 8 2d 355, 360-65 (Wa. 1988) (affirming summary judgment where plaintiff’s claim of age
 9 discrimination was based on nothing more than conclusory statements by plaintiff).

10 Additionally, as discussed above when discussing Plaintiff’s retaliation claim, IBM had a
 11 legitimate non-discriminatory reason for terminating Plaintiff’s employment. *See* Section II.C. 3)
 12 above. Plaintiff cannot show that IBM’s articulated reason is a pretext for age discrimination,
 13 because Plaintiff has offered no basis to tie his age to his termination and further, no one
 14 involved in the decision to terminate Plaintiff’s employment was even aware of his age.
 15 (Alexander Dep. 299:20-22; Copeland Dep. 222:13-18; Larkin Dep. 295:16-18; Teltsch Dep.
 16 179-16-18; Johnson Dep. 191:3-6; Kenny Dep. 339:2-7; Mihalik Dep. 265:21-23; Mandel Dep.
 17 175:2-3; Leonard Dep. 246:23-247:1).

18 Accordingly, the Court should grant IBM summary judgment on Plaintiff’s age
 19 discrimination claim.

20 **D. Plaintiff’s Unjust Enrichment Claim Fails.**

21 Plaintiff asserts a claim for unjust enrichment, which requires “a benefit conferred upon
 22 the defendant by the plaintiff,” as well as “the acceptance or retention by the defendant of the
 23 benefit under such circumstances as to make it inequitable for the defendant to retain the benefit
 24 without the payment of its value.” *Young v. Young*, 164 Wn.2d 477, 484 (2008) (citing *Bailie*
 25 *Communications, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160 (1991)). Plaintiff admits
 26 that he was paid all commissions he was owed at the time his employment was terminated. (Pl.

1 Dep. 153:22-154:4). Notwithstanding this damning admission, Plaintiff claims he is owed
 2 additional commissions by IBM.

3 Specifically, Plaintiff contends that after his termination the revenue on the ledger was
 4 revised for deals that were closed while he was employed and already paid commissions for,
 5 which would have resulted in additional commissions to him if he had still been employed. (Pl.
 6 Dep. 154:5-15). A provision in Plaintiff's IPL addressed this exact situation when an individual
 7 may leave IBM in the middle of a plan period. Specifically, Plaintiff's IPL stated:

8 **Leaving the Plan Early:** If for any reason (including leaving
 9 IBM's employment) you leave your currently assigned Incentive
 10 Plan before the last day of its full-plan period, *your final
 11 achievement for that Plan will be based on business results
 12 credited to you as of the last day of the last full-month you were
 13 on that Plan*. The final incentive payments will be made according
 14 to the normal payment schedule for that Plan. If you remain with
 IBM in a non-incentives role, after receiving your final incentives
 payment your future IBM compensation will be determined by the
 terms of your new role.

15 (Pl. Dep. Ex. 12, at p. 3 (emphasis added)). Per this provision, Plaintiff was entitled to
 16 commissions based on the revenue results as of the last day he was employed, and Plaintiff
 17 admits he was paid all commissions he was due as of the last day of his employment. (Pl. Dep.
 18 153:22-154:4). Thus, based on the unambiguous terms of his IPL, Plaintiff was not entitled to
 19 additional commissions after his termination. *See Babcock v. ING Life Ins. & Annuity Co.*, No.
 20 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035, at *21-23 (E.D. Wash. Jan. 2, 2013) (granting
 21 defendant summary judgment on plaintiff's unjust enrichment claim where a release made clear
 22 that plaintiff was entitled to periodic payments but not any investment proceeds of the annuity
 23 purchased by defendant). As Plaintiff himself testified, he believes "people should be paid
 24 according to the rules of the IBM commission program, which are specified in each of their
 25 quota plans, quota letter..." (Pl. Dep. 107:13-19). Here, Plaintiff was paid pursuant to the terms
 26 specified in his commission plan.

Accordingly, the Court should grant IBM summary judgment on Plaintiff's unjust enrichment claim.

IV. CONCLUSION

For the foregoing reasons, IBM respectfully requests that this Court grant its Motion for Summary Judgment and dismiss this action in its entirety.

DATED this 14th day of December, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the United States of America that on this day, I electronically filed a true and accurate copy of the document to which this declaration is affixed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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DATED this 14th day of December, 2020 at Lynnwood, Washington.

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